IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CMPMO No.27 of 2007

Judgment reserved on:26.11.2007.

Date of decision: 14.12.2007.

Deepender Rohal ....Petitioner

-Versus-

Suresh Thakur and others ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? Yes

For the Petitioner: Mr.Satyan Vaidya, Advocate.

For Respondents: Mr.Bipin Negi, counsel for Respondent No.1.
Mr.J.S.Guleria, Law Officer for respondents No.2 to 4.

Deepak Gupta,J.

The following interesting question of law arises in this petition:

> "Whether an Election Petition not filed in the manner prescribed or within the time prescribed under Section 163 of the H.P. Panchayati Raj Act is bound to be dismissed or this is a defect which can be cured?"

The relevant facts of the case are that the petitioner herein was elected Pradhan of Gram Panchayat, Anandpur, Block Mashobra, Tehsil and District Shimla on 18.12.2005 and a notification in this regard was issued on 13.1.2006. His election was challenged by respondent No.1 by filing an Election Petition under Section 163 of the H.P. Panchayati Raj Act, 1994 (hereinafter referred to as the Act)

before the Authorized Officer. The election petition was supported by an affidavit but was not verified as prescribed under the Code of Civil Procedure. One of the grounds taken in the election petition was that the Counting Officer in a well calculated move had wrongly and illegally declared 30 votes to be invalid. Other grounds taken were that the Counting Officers/Polling Officers were appointed in violation of the Rules and that in Ward No.4 the Polling Officer at the instance of the local officers purposely folded the valid papers in wrong manners which resulted in the ink being transferred to the other side and 30 votes were rejected. It was also alleged that the Counting Officers permitted an unauthorized person to enter the counting place. The petitioner herein filed an application under Section 165 of the Act praying that the petition be dismissed since the same has not been filed in conformity with the provisions of the Act and the Rules. This application was contested by respondent No.1. The Sub Divisional Officer upheld the objection of the petitioner and held that the Election Petition was not filed in accordance with the statutory provisions of the Act and was bound to be dismissed. The respondent No.1 filed an appeal and the Appellate Authority relying upon the judgment of the Supreme Court in **Sardar Harcharan Singh Brar vs. Sukh Darshan Singh and others, (2004)11 SCC 196,** held that an election petition could not be dismissed in limine for non compliance of the provisions of Section 83(1) & (2) of the Representation of the People Act (hereinafter referred to as the RP Act) and had to be heard on merits.

Learned counsel for the parties have been heard. To appreciate the rival contention of the parties it would be apposite to refer to certain provisions of the Act as well as certain provisions of the RP Act. Sections 163, 163-A, 165 & 165 & Rule 94 of the Act provides as under:

> **"163.Presentation of petition**.-(1)Any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present within thirty days of the publication of the result, on one or more of the grounds specified in sub-section (1) of section 175, to the authorized officer an election petition in writing against the election of any person under this Act.
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> (2)The election petition shall be deemed to have been presented to the authorized officer-
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> (a)when it is delivered to him-
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> (i)by the person making the petition; or
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> (ii)by a person authorized in writing in this behalf by the person making petition; or
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> (b)when it is sent by registered post and is delivered to the authorized officer or any other person empowered to receive it.
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> **163-A.Parties to the petition**.- A petitioner shall join as respondent to his petition-
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> (a)where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
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> (b)any other candidate against whom allegations of any corrupt practice are made in the petition.
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> **164.Contents of petition**.-(1)An election petition-
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> (a)shall contain concise statement of the material facts on which the petitioner relies.
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> (b)shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice, and
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> (c)shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleading:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2)Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

165.Procedure on receiving election petitions.-if the election petition is not furnished in the prescribed manner, or the petition is not presented within the period specified in section 163 the authorized officer shall dismiss the petition:

Provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard.

Rule 94:Presentation of petition.-(1)The election petition under section 163 of the Act shall be presented to the authorized officer under whose territorial jurisdiction the Gram Panchayats, Samiti or Zila Parishad, as the case may be is situated.

(2)The election petition shall enclose with the petition copies of the petition and of its enclosures equal to the number of respondents.

(3)The affidavit referred to in the proviso to sub-section (i) of section 164 of the Act shall be in Form 43 and shall be shown before a Magistrate."

Sections 81, 82, 83 & 86(i) of the RP Act reads as follows:

"81.Presentation of petitions-(1)An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.-In this sub-section "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2)omitted

(3)Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

82.Parties of the petition.-A petitioner shall join as respondents to his petition-

(a)where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b)any other candidate against whom allegations of any corrupt practice are made in the petition.

83.Contents of petition.-(1)An election petition-

(a)shall contain a concise statement of the material facts on which the petitioner relies;

(b)shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c)shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings;

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2)Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

86.Trial of election petitions.-(1)The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.-An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98."

All the authorities cited before me are under the RP Act. In **Charan Lal Sahu vs. Nandkishore Bhatt and others, AIR 1973 SC 2464,** the Apex Court held that if the security is not deposited in terms of Section 117 of the Act the Court has no option but to reject the petition.

In **M.Karunanidhi vs. H.V.Handa and others, AIR 1983 SC 558,** the Apex Court held that the amount of security must be deposited and this part of section 117 is mandatory. However, the fact that the deposit was not made in accordance with the Rules of the High Court would not be a sufficient ground to dismiss the petition and that this portion of the section is only directory in nature.

In **F.A. Sapa and others vs. Singora and others, (1991) 3 SCC 375,** the Apex Court was dealing with a case in which there was a defect in the verification of the petition. The Apex Court held that a defect in the verification is one which can be cured and is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground. The Apex Court held as follows:

> "21……..
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> It is thus clear from this decision which is binding on us that mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground. As observed earlier since Section 83 is not one of three provisions mentioned in Section 86(1), ordinarily it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Section 81."

In **Dr.Vijay Laxmi Sadho vs. Jagdish, AIR 2001 SC 600,** the Apex Court again held that an election petition cannot be dismissed in limine in case it is not supported by a proper affidavit. It held that a defect in the verification of an affidavit is curable. The Apex Court held as follows:

> "An election petition is liable to be dismissed in limine under S.86(1) of the Act only if the election petition does not comply with either of the provisions of S.81 or S.82 or S.117 of the Act. The requirement of filing

an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in S.83(1) of the Act. Thus, an election petition is not liable to be dismissed in limine under S.86 of the Act, for alleged non-compliance with provisions of S.83(1) of the Act or of its proviso. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is to be judged at the trial of an election petition but S.86(1) of the Act in terms cannot be attracted to such a case. Defect in verification of an affidavit is curable and does not merit dismissal of an election petition in limine under S.86(1) of the Act."

Similar view has been taken in **Sardar Harcharan Singh Brar's** case (supra) wherein the Apex Court held as follows:

"14.So is the case with the defect pointed out by the High Court in the affidavit filed in support of the election petition alleging corrupt practice by the winning candidate. The proviso enacted to sub-section (1) of Section 83 of the Act is couched in a mandatory form inasmuch as it provides that a petition alleging corrupt practice shall be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. The form is prescribed by Rule 94-A. But at the same time, it cannot be lost sight of that failure to comply with the requirement as to filing of an affidavit cannot be a ground for dismissal of an election petition in limine under sub-section (1) of Section 86 of the Act. The point is no more res integra and is covered by several decision of this Court. Suffice it to refer to two recent decisions namely G.Mallikarjunappa vs.Shamanur Shivashankarappa and Vijay Laxmi Sadho (Dr.) v. Jagdish, both three-Judge Bench decisions, wherein the learned Chief Justice has spoken for the Benches. It has been held that an election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of "Section 81 or Section 82 or Section 117 of the RP Act". The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the

> verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

From a perusal of the judgments of the Apex court it is clear that the Apex Court has repeatedly held that an election petition is liable to be dismissed in limine under Section 86(1) of the RP Act if the election petition does not comply with either the provisions of Sections 81 or 82 or Section 117 of the RP Act. Under the RP Act the requirement of verification and filing of an affidavit is under Section 83. Section 86 empowers the Court to dismiss the petition in limine only if the provisions of Sections 81, 82 or 117 are not complied with. Section 86 does not empower the Court to dismiss a petition in limine in case of non-compliance of Section 83. It is because of this reason the Apex Court in a number of judgments has held that the defect in verification is a curable defect and hence the petition cannot be dismissed in limine.

In the present case the verification is admittedly not in accordance with the provisions of the Code of Civil Procedure. The provisions of Section 165 of the Act cast a mandatory duty on the Authorized Officer to dismiss the petition if the election petition is not furnished in the prescribed manner or the petition is not presented within the period specified under section 163. The manner of filing the petition is prescribed in Section 163, 163-A, 164 and Rules framed there under. Section 164 clearly lays down that the petition must be signed and verified in the manner laid down by the Court for

verification of the pleadings. Therefore, without going into the question whether the averments made in the petition amounted to laying charges of corrupt practice, the petition had to be verified in accordance with the provisions of Code of Civil Procedure. This has admittedly not been done. It is thus clear that the petition has not been furnished/filed in the prescribed manner.

The Rulings relied upon by Sh.B.C.Negi have no applicability to the present case. The language of Section 165 of the Act is much wider than Section 86 of the RP Act. Under Section 86 the High Court can reject only those petitions which do not comply with the provisions of Sections 81, 82 or 117 of the RP Act. Under Section 165 of the Act the Authorized Officer shall dismiss a petition which is not furnished in the prescribed manner or within the prescribed time. The legislature in its wisdom framed the section in such wide terms. The Court cannot add or subtract any word from the statute. The language of Section 165 leads to only one clear-cut conclusion that any election petition not filed in the manner prescribed under the Act or the Rules has to be dismissed.

In view of the above discussion I am of the considered opinion that since the election petition filed by respondent No.1 was not verified in the manner laid down under the Code of Civil Procedure for verification of pleadings, the petition had to be rejected under Section 165 of the Act. This defect may be a curable defect but the legislature in its wisdom has directed that a petition which is defective must be dismissed. Consequently, the order of the learned

Appellate Authority is set-aside and the order of the learned Authorized Officer is upheld and the election petition filed by the respondent No.1 is deemed to be rejected under Section 165 of the Act. No costs.

December 14, 2007. **(Deepak Gupta),**
PV **Judge.**